

12 May 2006

The Chair, Transport Industry Council
c/- Industrial Relations Victoria
Level 3, 55 Collins St
MELBOURNE VIC 3000

To the Chair and members of the Transport Industry Council

RE: ISSUES PAPER

On behalf of the Construction Material Processors Association's members it gives me pleasure to present the attached submission.

An integral part of the earth resources sector is the transportation of its primary product to its end users. This has seen many in the sector outsource the delivery of their materials to owner drivers in addition to other means. Historically this has seen our sector (i.e. the earth resources) enjoying a symbiotic relationship with owner drivers which have been commercially beneficial for all concerned.

Issues of particular importance to our members have included the definition of unconscionable conduct, flexibility of fuel variation clauses, contracts and rates, and predatory pricing.

We appreciate the opportunity that this Issues Paper provides us and hope that the following submission assists you in your deliberations.

Please do not hesitate in contacting me should you wish to discuss this submission further or meet with the Association's members. Email enquiries@cmpavic.asn.au or call on 03 5781 0655.

Yours sincerely



Grant Phillips
CMPA Chairperson

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SUBMISSION TO THE

**TRANSPORT INDUSTRY COUNCIL
ISSUES PAPER**

BY THE

**CONSTRUCTION MATERIAL PROCESSORS
ASSOCIATION**

MAY 2006

INTRODUCTION

In May 2005, the CMPA was advised by the Victorian Association of Forest Industries of the development of a bill titled, 'Owner Drivers and Forestry Contractors Bill'. This document caught the interest of the association due our member's utilisation of owner drivers in transporting bulk materials. Subsequently, the bill was closely monitored by the association culminating in an industry forum held on September 23, 2005. The bill has since become the "*Owner Drivers and Forestry Contractors Act 2005*" (the Act).

Those present at the forum clearly defined a need to have a clear and concise means of meeting the requirements of this Bill, before becoming an Act. As such, the association commissioned the development of a sector specific generic model contract designed for quarry operators ('hirers') in their dealings with cartage contractors ('owner drivers')¹. This is yet to be finalised, however is being worked through with representatives of Industrial Relations Victoria. It was interesting to see that a number of the discussion topics raised in the Issues Paper have been addressed in the model contract.

As such the association is able to make comment upon the direction of the Transport Industry Council at this early stage. This will assist all concerned in ensuring that their needs and expectations are met in the fairest and most equitable manner.

Prior to addressing any of the discussion topics, the CMPA would like to clarify the reason for the introduction of the *Owner Drivers and Forestry Contractors Act 2005*. Our members require proof of how this Act will benefit the industry and the wider community. It is essential in the eyes of our members that legislation is not simply introduced as a means to cut government costs, counteract the actions of other government levels or to address the concerns of a small but vocal minority.

Key points of information supplied for your consideration are:

1. The construction materials sector in Victoria and the CMPA
2. The role of the code in determining what is unconscionable conduct
3. Unpaid work
4. Fuel variation clauses
5. Period for payment of invoices, other commercial terms
6. Driver illness and family responsibilities
7. Disputes processes and renegotiation
8. Purchase of new vehicles
9. Goodwill or entry payments
10. Restraint of trade / no competition contract clauses
11. Advertising for new drivers
12. Contracts and rates
13. Technology and additional equipment
14. Other issues

A brief discussion of each of these issues is following. These issues are presented on the basis that they are representative of our member's experiences and opinions².

¹ For the purposes of this submission, we have used the terminology of the Issues Paper in preference to the industry standards of operator or principle ('hirer') and contractor or cartage contractor ('owner driver')

² In particular, we would like to recognise the efforts of Mark Wagner and Lindsay Coombs in developing this submission

1. THE CONSTRUCTION MATERIALS SECTOR IN VICTORIA & THE CMPA

A key component of the construction, building and, in many cases, manufacturing industries is the supply of competitively priced rock, stone, sand, clay and gravel products which are essential for the production of concrete, cement, bricks, tiles, asphalt, crushed rock products and a host of other applications. Stone is primarily used for construction of roads and buildings but also has other uses in engineering and manufacturing.

Victoria has an abundance of such good quality construction materials, which unlike metallic minerals and ores, are low in value. This means to be viable extraction needs to occur close to market sources. The industry is characterised by relatively few large operators (3) and many small to medium operations³. Many construction material operations have developed in rural and regional areas to satisfy a local demand.

The CMPA represents such businesses across Victoria who are involved in construction material processing engaged in the extracting, processing or otherwise working in hard rock, gravel, sand, masonry, clay, lime, soil, gypsum or recycling. These members in the most part engage owner drivers to supplement or instead of their own transport fleet.

Based on the state's annual production of 41,699,672 tonnes in 2004/05⁴ and the fact that average truck carries 13 tonnes of material and a truck with quad-dog trailer carries 33 tonnes of material, it can be estimated that between 1,263,626 and 3,207,667 transport movements occur in industry annually⁵. These transport movements occur at distances up to 250km. This clearly demonstrates the importance that the industry places upon owner drivers and the importance of ensuring the needs of both hirers and owner drivers are met in contractual relations.

2. THE ROLE OF THE CODE IN DETERMINING WHAT IS UNCONSCIONABLE CONDUCT

In the opinion of the CMPA the code should address unconscionable conduct by including a linking reference to Sections 31 and 32 of the Act. Those sections provide guidance as to what may be taken into account in assessing whether conduct may be unconscionable. The sections include many issues that are contained in other legislation and their use will provide consistency and certainty between different jurisdictions. It would not be helpful at this stage to more tightly prescribe conduct as unconscionable as conduct by certain parties may, in all the circumstances, be unconscionable while the same or similar conduct, by other parties may not be sufficiently harsh in the circumstances as to be unconscionable.

In the opinion of the CMPA codes rarely work in the absence of provisions for their enforcement. Other legislation covering unconscionable conduct prescribes damages as the appropriate enforcement mechanism rather than fines or other penalties. This allows the position of the damaged party to be reinstated rather than penalties going to other recipients. The CMPA believes that for consistency and certainty between jurisdictions payment of damages to the other party in the event either the hirer(s) or the owner driver(s) contravening the unconscionable conduct sections of the code is an appropriate enforcement mechanism.

For this to work the Tribunal must have the power to issue determinations allocating damages. This does not appear to be included in the Act and should be included in any code.

Recommendation

- The code should address unconscionable conduct by including a direct link to the provisions of sections 31 and 32 of the Act. No further detailed proscription should be included.
- The code should address enforcement of the unconscionable conduct provisions by inclusion of a provision for the allocation of damages to either party by the Tribunal in the event either the hirer(s) or the owner driver(s) act in a manner contravening that section of the code.

3. UNPAID WORK

The CMPA offers no suggestion on how the Council should address this issue however consideration would need to be given to unavoidable events such as major road closures (i.e. Monash Freeway closure in early May) and tolled roadways.

³ Medium operations being those employing less than 200 persons, small being fewer than 20 employees

⁴ p38, Department of Primary Industries, [Victoria's mineral, petroleum and extractive industries 2004/05 statistical review](#)

⁵ These figures are only accounting for the transport movement from the quarry to the purchaser. As many purchasers are in their own right resellers, this figure may be substantially higher.

4. FUEL VARIATION CLAUSES

The CMPA accepts that world energy prices will continue to fluctuate outside of any jurisdiction and understands the need for hirers to address this issue within the rates paid to owner drivers.

Our preference is for models that are not prescriptive. Rates may be varied in a number of ways including the application of an appropriate index to the overall rate rather than adjusting any element such as fuel directly. While fuel is a problem at the moment other items may be more important issues in the future. Any model adopted must be adaptive and soothe the impact of an increase in any element of rates which can reasonably be passed onto a customer or reduced for the customers benefit.

Generally fuel would be included as an element of rates. As such there would be a lag in both increasing and decreasing prices according to fluctuations. This should balance out over time. It is important that if fuel is adjusted separately it is not included in the calculation of rates to avoid double counting. It is also important that any mechanism does not respond to any short term variations but looks to movement over the long term.

The code should be flexible so as to allow an individual hirer to adopt model clauses or meet such obligations in an alternative manner.

Recommendation

- The code should provide for increased or decreased costs in all elements of rates and not be limited to any special arrangement for fuel.
- The code should provide model variation clauses which hirers can either implement directly into agreements with owner drivers or meet through alternative means.

5. PERIOD FOR PAYMENT OF INVOICES, OTHER COMMERCIAL TERMS

The CMPA feels that any “period for payment” contained in the code, or any other terms relating to payment should be aligned with the terms in the *Security of Payment Act*.

The CMPA feels that it is too early to comment on other commercial terms. It will be better to allow for the preparation of model contracts first and then determine whether any terms developed need to be backed by the code directly or whether the code can merely reinforce the contract in it entirety.

Recommendation

- That any ‘period of payment’, or other terms relating payment documented within the code align directly with those contained within the Security of Payment Act
- That consideration of the application of the code to other commercial terms be delayed until those terms are identified in model contracts.

6. DRIVER ILLNESS AND FAMILY RESPONSIBILITIES

The CMPA offers no suggestion on how the Council should address this issue however notes that the CMPA’s generic model contract will take this issue into consideration.

That said, it is important that the code communicates the importance of the owner driver covering such issues within their rates as an operating cost within their wages section.

7. DISPUTES PROCESSES AND RENEGOTIATION

All contracts (and therefore model contracts) made between hirers and owner drivers will require a means for dispute resolution in the event of a total breakdown of communication. Any contract should outline the mechanism for dispute resolution but should allow choice between the parties of any mediator or adjudication. Usually such contracts will have a default mechanism for choice of a mediator or arbitrator if the parties cannot agree.

That CMPA's position is that this default mechanism should allow either for the use of a mediator or arbitrator selected by the Office of the Small Business Commissioner, or allow for the Office to act as a mediator or arbitrator.

Recommendation

- That disputes arising under contracts made between hirers and owner drivers should be settled by a mediator or arbitrator agreed to by the parties.
- As a default where the parties cannot agree the contract should allow for selection of a mediator or arbitrator selected by the Office of the Small Business Commissioner or for that Office to act as a mediator or arbitrator.

8. PURCHASE OF NEW VEHICLES

There is an example given within the Issues Paper of a person purchasing a non-compliant vehicle in a quarry situation. In order to address issues such as this, it is the opinion of the CMPA that the code refers owner drivers to VicRoads (legal loads), EPA (emissions), NOHSC (OHS) and other statutory bodies to ensure they purchase a legally compliant vehicle. It would also be of benefit for the code to involve the manufacturers to encourage them to provide such information to potential purchasers.

Furthermore, the CMPA will urge its members to establish 'reasonable specifications' for vehicle standards and age in line with their company policies, loading abilities and customer requirements. This would not be able to be set at a state level.

Recommendation

- That the code provides a support platform through statutory bodies and vehicle manufacturers to ensure owner drivers purchase a legally compliant, suitable vehicles

9. GOODWILL OR ENTRY PAYMENT

Based on the sector's historical activities, the CMPA would advise the Council that such payments are entirely inappropriate in this sector.

Recommendation

- That goodwill or entry payments are entirely inappropriate in the earth resources sector

10. RESTRAINT OF TRADE / NO COMPETITION CONTACT CLAUSES

The CMPA would argue that any restraint of trade issues should not arise from arrangements made between hirers and owner drivers. During the period of the contract the owner driver will have an obligation to carry out the work required by the hirer.

Where the Owner driver is a natural person operating solely it is unlikely they will be able to work for competitors without breaching the contract. Where the owner driver is a corporation who could be able to work for competitors they will still have a legal requirement to provide services required under the contract whether by the same or different vehicles.

Provided soliciting future business does not interfere with the performance of the contract the CMPA sees no reason for restricting the owner drivers ability to do this even while the contract is in force. Once the contract has been completed the CMPA can see no reason why any member should desire to restrict for whom the owner driver works.

That said, the use of logos and corporately owned insignia should be carefully considered in the arrangements made between hires and owner drivers as should the use of any information that may have been obtained by the owner driver while employed by the hirer. This information would include details of the terms of the contract including agreed rates of remuneration.

Recommendation

- The code should prohibit the use of no competition clauses in contracts. However the code should do nothing to prevent the normal enforcement of the performance of the contract except insofar as such enforcement may be achieved by unconscionable conduct.
- The code should cover the need for confidentiality of the terms of agreement between the owner driver and the hirer including rates and other negotiated issues within the contract.

11. ADVERTISING FOR NEW DRIVERS

The Fair Trading Act of Victoria and the Commonwealth Trade Practices Act contain an offence that:

A person must not, in relation to employment that is to be, or may be, offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to the availability, nature, terms or conditions of, or any other matter relating to, the employment.

The terms of employment are usually so complex that to require some to be advertised would inevitable result in others being overlooked or not highlighted as being equally important. This could lead to confusion in itself.

Rather than dealing with the advertisement, which is already covered by law, the code could alert owner drivers as to issues which they should query and investigate with potential hirers where insufficient, or misleading, information may have been supplied to them.

Recommendation

- That the code should alert owner drivers as to issues which they should query and investigate with potential hirers where insufficient, or misleading, information may have been supplied to them.

12. CONTRACTS AND RATES

The CMPA would suggest that the cost information should be aggregated from each industry sector. For example the CMPA facilitated a recent transport forum to substantiate applicable cost headings / model. We would urge the Council to adopt such schedules as the basis for establishing each industry costing.

Costs⁶:	
<ul style="list-style-type: none"> ● Accommodation and meals ● Accounting fees ● Administration ● Administration fees ● Audit fees ● Bank fees and charges ● Building (resources and materials) ● Cleaning ● Data processing ● Distance travelled ● Electricity ● Fuel (annual km x fuel x economy x cost of fuel) ● Hire/equipment ● Insurance (3rd party*, public liability) ● Licences and/or permits* ● Loading/unloading charges 	<ul style="list-style-type: none"> ● Oil ● Ownership of equipment* <ul style="list-style-type: none"> - Depreciation - Interest - Lease - Profit ● Postage/telephone/fax/modem ● Printing/stationary ● Registration* ● Rent* ● Schedule service and other maintenance ● Truck wash ● Uniforms ● Variations ● Wage (normal, overtime, on-costs such as leave, sick pay, superannuation)

Income
<ol style="list-style-type: none"> 1. Kilometres travelled and billed, or 2. Hours worked, or 3. Tonnes carried, or 4. Tendered lump sum payment

Each individual hirer can take this information into consideration when establishes the rates that is agreed to with the owner driver.

In the event of a major variation between the costings established by the Council which set the rates, and those in the industry not encapsulated by the *Owner Drivers and Forestry Contractors Act* to the detriment of those operating with consideration of those rates, then the Council must have a means of recourse as per 'Other issues'.

Recommendation

- That the Council adopt cost models for each industry sector and this information is aggregated for each sector

13. TECHNOLOGY AND ADDITIONAL EQUIPMENT

The CMPA has no difficulty in these items being listed and checked off for each contract period. It is important however that this list includes those items that the hirer and owner driver have agreed to above and beyond that specific under their standard vehicle standards.

⁶ Those marked ** are costs required to open a business. All other costs will vary depending upon income.

14. OTHER ISSUES

Predatory Pricing

We would like to point out to the Council industry's concerns regarding "third party" predatory pricing. By way of a hypothetical example we would like to offer what we see as a possible scenario:

Example:

An agreement is reached by one of our members in a particular geographic area with owner drivers. The rates have been set taking into consideration either the published rates or cost structures provided under the Owner Drivers and Forestry Contractors Act. A reasonable size project is out for tender in the area and our member submits material and cartage pricing to obtain the work.

At the same time another company outside the geographical area that also is interested in the work, tenders and because of the differential in cartage rates wins the work.

This could be because the company owns its own fleet of trucks or has formed an alliance with a large transport operator for whom the published materials from the Council is of no concern.

Our understanding is that the costing model or subsequent rates in this scenario will be that such companies or business are outside the scope of the *Owner Drivers and Forestry Contractors Act*.

We would hope that the Council will have some pro-active mechanism to counter act any evidence of predatory pricing that could affect a hirer and owner operator that have acted in good faith to operate within the intentions and spirit of the Act.

We believe that some form of protection strategy should be made clear by the Council within the code. This protection would need to be able to address such issue efficiently and timely as deliveries in many instances needs to occur promptly.

Recommendation

- That the code contains some form of protection strategy in the event that predatory pricing is reported to the Council

15. CONCLUSION

Due to the peculiarities of this sector as highlighted throughout this submission and no doubt through all the other sectors covered under the Act's umbrella, the CMPA sees it as essential for there to be industry specific codes covering our sector and that of other transport industries.

Finally, when and if this Act is tested in both the Australian Competition and Consumer Commission and the Federal Court's Australian Competition Tribunal it will be important to ensure that industry is not left in a similar position to the Victorian broiler industry⁷.

Summary of Recommendation

- The code should address unconscionable conduct by including a direct link to the provisions of sections 31 and 32 of the Act. No further detailed proscription should be included
- The code should address enforcement of the unconscionable conduct provisions by inclusion of a provision for the allocation of damages to either party by the Tribunal in the event either the hirer(s) or the owner driver(s) act in a manner contravening that section of the code
- The code should provide for increased or decreased costs in all elements of rates and not be limited to any special arrangement for fuel
- The code should provide model variation clauses which hirers can either implement directly into agreements with owner drivers or meet through alternative means
- That any 'period of payment', or other terms relating payment documented within the code align directly with those contained within the *Security of Payment Act*
- That consideration of the application of the code to other commercial terms be delayed until those terms are identified in model contracts
- That disputes arising under contracts made between hirers and owner drivers should be settled by a mediator or arbitrator agreed to by the parties
- As a default where the parties cannot agree the contract should allow for selection of a mediator or arbitrator selected by the Office of the Small Business Commissioner or for that Office to act as a mediator or arbitrator
- That the code provides a support platform through statutory bodies and vehicle manufacturers to ensure owner drivers purchase a legally compliant, suitable vehicles
- That goodwill or entry payments are entirely inappropriate in the earth resources sector
- The code should prohibit the use of no competition clauses in contracts. However the code should do nothing to prevent the normal enforcement of the performance of the contract except insofar as such enforcement may be achieved by unconscionable conduct
- The code should cover the need for confidentiality of the terms of agreement between the owner driver and the hirer including rates and other negotiated issues within the contract.
- That the code should alert owner drivers as to issues which they should query and investigate with potential hirers where insufficient, or misleading, information may have been supplied to them.
- That the Council adopt cost models for each industry sector and this information is aggregated for each sector
- That the code contains some form of protection strategy in the event that predatory pricing is reported to the Council

⁷ p3. Duff, X. The Weekly Times. April 26 2006